BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL L. HERPICH	)	
Claimant	)	
VS.	)	
	)	Docket No. 267,675
PARK MECHANICAL, INC.	)	
Respondent	)	
AND	)	
	)	
SAFECO INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested Appeals Board review of the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on October 18, 2001.

ISSUES

This is a claim for a work-related accident and resulting injury to claimant's back, wrist and arm. Claimant was injured on Friday, April 7, 2000. He notified his foreman, Manuel Delarosa, of his injury on the following Monday, which was to have been his next work day. He was not offered medical treatment and so claimant sought medical treatment on his own, initially with two chiropractors, Drs. Schrorer and Scharenberg, and was off work for approximately 8-10 weeks. During his absence and even after he returned to work, claimant again discussed his injury with Mr. Delarosa. Claimant also spoke with another supervisor named Mitch about his injury and medical bills. Nevertheless, respondent never offered medical treatment nor designated any particular physician for claimant to see.

At the time of claimant's injury, Park Mechanical, Inc., was a subcontractor of Mitchell Construction Company. Eventually claimant asked an employee of Mitchell Construction, Betty Jones to write a note about his medical care and bills, which she did and she gave it to Ron Miller, a supervisor for Mitchell Construction.

Claimant appeals the Administrative Law Judge's (ALJ) finding that he is not entitled to workers compensation benefits because he failed to serve a timely written claim for compensation on respondent.[1] Claimant contends the note Betty Jones gave to Ron Miller provided respondent with a timely written claim based on an agency relationship between Park Mechanical Inc., and Mitchell Construction. In the alternative, claimant argues respondent should be estopped from asserting a written claim defense.

Conversely, respondent requests the Board to affirm the ALJ's Decision. Respondent argues that the Betty Jones note does not meet the requirement of a written claim for compensation, it was never delivered to anyone employed by respondent and that the doctrine of equitable estoppel does not apply to these facts.

Findings of Fact and Conclusions of Law

After reviewing the record and considering the parties' briefs, the Board finds and concludes that claimant did not serve respondent with a timely written claim for compensation.

The following facts are relevant to deciding the timely written claim issue: (1) Claimant suffered a work-related accidental injury on April 7, 2000; (2) Claimant gave respondent timely notice of his accidental injury; (3) The record shows respondent failed to file an Employer's Report of Accident with the Director within 28 days of the April 7, 2000 accident,[2] (4) No medical expenses were paid by respondent or its insurance carrier on claimant's behalf,[3] and; (5) Claimant did not serve respondent with a written claim for compensation until sometime after June 18, 2001.[4]

Claimant was an employee of respondent, Park Mechanical, Inc., when he was injured on April 7, 2000. At that time, respondent was a subcontractor of Mitchell Construction. Claimant was off work for approximately 8-10 weeks after his injury. While he was off work and also after he returned to work, claimant spoke with his foreman, Mr. Delarosa, and with Mitch, the supervisor at the home office in Texas, and also with several employees of Mitchell Construction, including supervisory level employees, concerning his

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[1] *See* K.S.A. 44-520a(a).

[2] *See* K.S.A. 44-557(a).

[3] *See* Odell v. United School District, 206 Kan. 752, 481 P.2d (1971).

[4] Claimant's June 18, 2001 demand letter and the Application for Hearing filed July 6, 2001 with the Kansas Division of Workers Compensation, both refer to an accident date of May 7, 2000 and identified the employer as Cedar Park Mechanical & Plumbing, Inc. This was later amended to allege an accident date of April 7, 2000 and the employer's name was changed to Park Mechanical.

injury and payment of his medical bills. At one point it was suggested by Mitch that Mitchell Construction would be responsible for payment as the accident was the fault of Mitchell Construction's employees. Eventually claimant asked Betty Jones, a Mitchell Construction employee, to write a note about the payment of his medical bills. She delivered the note to Ron Miller, a supervisor for Mitchell Construction. This note was delivered within 200 days of claimant's accident date. The note is not in evidence but Ms. Jones testified that it essentially said that claimant wanted to speak with Mr. Miller about his injury and requested that Mr. Miller contact claimant.

Respondent argues that claimant's claim for workers compensation benefits is barred because he failed to timely serve a written claim for benefits on respondent. Claimant timely notified respondent of his work-related injury but he was never provided with medical treatment for that injury. In its brief to the Board, respondent contends that K.S.A. 44-520a controls the time claimant had to serve respondent with a written claim for compensation. However, at page 61 of the October 17, 2001 Preliminary Hearing Transcript, counsel for respondent acknowledges that respondent did not timely file an Employers Report of Accident and, therefore, claimant had one year from the April 7, 2000 accident date to serve his written claim for compensation.[5] Nevertheless, respondent argues that the first written claim for compensation that claimant served upon respondent was the letter from claimant's attorney dated June 18, 2001, more than one year from the accident date.

Claimant contends that under the facts and circumstances of this case, the note written by Betty Jones satisfied the written claim requirement.

One of the purposes of the written claim requirement is to enable the employer to know about the injury in time to investigate it.[6] The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.[7] The written claim is, however, one step beyond notice in that an intent to ask the employer to pay compensation is required.[8] Another purpose of the written claim statute, therefore, is to require the employee to make a positive claim in writing, that he or she desires to recover under the

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[5] *See* K.S.A. 44-557(c).

[6] *See* Craig v. Electrolux Corporation, 212 Kan. 75, 82, 510 P.2d 138 (1975).

[7] *See* Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978).

[8] *See* Fitzwater v. Boeing Air Plan Co., 181 Kan. 158, 166, 309 P.2d 681 (1957).

Workers Compensation Act. [9] But a written claim for compensation need not take on any particular form so long as it is in fact a claim.[10]

The Board finds the note written by Betty Jones did not contain sufficient written information to constitute a written claim for compensation. Furthermore, it was neither delivered to the respondent nor was it apparent that by having Betty Jones deliver such note to Mitchell Construction claimant was notifying respondent of his intent to receive workers compensation benefits. This conclusion is supported by claimant's testimony.

The finding that the note written by Betty Jones did not constitute a written claim for compensation applies both as to respondent and for any claim against Mitchell Construction. This also defeats claimant's argument of agency. Regardless of whether there was an agency relationship between Park Mechanical, Inc. and Mitchell Construction, no written claim was served upon either respondent or respondent's agent within one year of the accident.

Finally, claimant argues that respondent is estopped from denying the timeliness of written claim based on Mr. Delarosa's instructions to file for unemployment compensation and Mitch's representations that he would take care of the matter and/or his implied instructions to claimant that claimant should instead pursue his claim against Mitchell Construction.[11]

The doctrine of equitable estoppel has been applied to workers' compensation proceedings.[12] Nevertheless, the Board finds that under the facts of this case as the record currently stands, claimant's equitable estoppel argument must fail. In Scott v. Wolf Creek the Court of Appeals held that the employer was not estopped from asserting the exclusive remedy provision of the Workers Compensation Act despite the fact that the employer told the employee's widow that workers compensation benefits were not available. Relying on the employer's representation, the employee's widow delayed filing a worker's compensation claim. The Court of Appeals did rule, however, "that estoppel would be available to plaintiffs in workers compensation proceedings and the issue should be resolved in that forum."[13] Estoppel was later applied in the subsequent workers

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[9] *See* Ricker v. Yellow Transit Freight Lines, Inc., 191 Kan. 151, 379 P.2d 279 (1963).

[10] *See* Ours v. Lackey, 213 Kan. 72, 515 P.2d, 1071 (1973).

[11] *See* K.S.A. 44-503.

[12] Marley v. M. Bruenger & Co., Inc., 27 Kan. App. 2d. 501, 6 P.3d 421(2000); Scott v. Wolf Creek Nuclear Operating Corp., 23 Kan. App. 2d 156, 928 P.2d 109 (1996).

[13] Scott v. Wolf Creek Nuclear Operating Corp., 23 Kan. App. 2d. at 162-163.

compensation action brought by Scott's widow to toll the running of the written claim statute. Like the factual scenario in Scott, the Board finds that the respondent herein induced claimant to delay making his claim.

Q. (Ms. Fisher) "Did you have any other discussions with people about who's going to pay for these bills?"

A. (Claimant) "All I was told is that keep paying it and see what your insurance will do and we'll make it right with you, one way or the other."[14]

For the purposes of estoppel, motivations or intentions do not matter. Neither fraud nor an intent to deceive need be established. Instead, claimant must show that respondent did something that affirmatively induced him to delay bringing his claim. When claimant presented his foreman with notice of a work related injury, the foreman did not mention the possibility of claimant obtaining workers compensation benefits. Rather, the foreman directed the claimant to file for unemployment insurance benefits if he could not work and Mitch said claimant's claim for payment of his medical expenses would be against the principal contractor rather than against respondent.

Q. (Ms. Fisher) "Okay, now let me back up just a little bit because that's – I'm a little ahead – you're a little ahead of me. What I'm trying to find out is, did you have any other discussions with individuals from Park Mechanical about who was responsible for the job - - the bills?"

A. (Claimant) "Yes, I talked to Mitch three different times that I know of on the phone."

Q. "And at any point did - - did he indicate to you who was responsible for paying these bills?"

A. "He talked like it was Mitchell's wall, that Mitchell - - he was going to talk to Steve Cox, which was running the job for Mitchell, but he was in Texas."

Q. "Okay"

A. "And he said he was going to talk to Steve Cox and see what kind of settlement we could come up with, because it was their wall and their job and he acted like it was their fault."

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[14] Tr. of Prel. H. at 33 (October 17, 2001).

Q. "All right. Did he ever get back to you and say, "Park is going to pay the bills," "Mitchell is going to pay the bills"?"

A. "That's when he said he was going to talk to Steve Cox, that was the third - - that's the last time I talked to him."[15]

Respondent now argues that this instruction was not erroneous because workers compensation benefits would be available from either the subcontractor or the principal contractor. Regardless of whether that is an accurate statement of the law, those benefits were not forthcoming from either respondent or the principal contractor. Like the respondent, the principal contractor never mentioned to claimant anything about his entitlement to workers compensation benefits nor the procedure he needed to follow to assert such a claim. On the other hand, at no time was claimant expressly told that he could not make a workers compensation claim against respondent or that he had already satisfied all of the requirements for making a workers compensation claim. Respondent argues that, to the contrary, claimant was told that he would have to make his claim against Mitchell Construction, which he failed to do.

The preliminary hearing record contains testimony from only the claimant and Betty Jones. From claimant's description of his conversations with the Park Mechanical, Inc., supervisor named Mitch, it is not clear whether those conversations were relative to his making a workers compensation claim or, instead, were in reference to his making a civil negligence claim. Mitch's reference to the wall was an allegation of negligence against Mitchell Construction's employees. The assumption was that claimant's accident resulted from the wall giving way and, since the wall was built by Mitchell Construction's employees, the fault for the accident, and thus the liability for claimant's injuries, rested with Mitchell Construction.

> In 1911, the legislature abolished a plaintiff's right to sue an employer for damages caused by the negligence of the employer. In place of this right, the legislature gave employees the Workers Compensation Act, which is supposed to provide a quick, set amount of money, without proof of employer negligence, for all employees injured on the job. The fact that a claim will be speedily processed is a part of the quid pro quo for the abrogation of the plaintiff's common-law right to sue a negligent employer.[16]

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[15] Tr. of Prel. H. at 29-30 (October 17, 2001).

[16] Injured Workers of Kansas v. Franklin, 262 Kan. 840, 852, 942 P.2d 591 (1997).

In this case, respondent's response to claimant's notice of accident violated both the spirit and the letter of the Worker's Compensation Act. [17]

Claimant was misled concerning his right to claim workers compensation benefits against respondent. He was also led to believe that respondent would be assisting him with a claim against Mitchell Construction and that, either way, respondent would "make it right" with him. But, the doctrine of equitable estoppel cannot be applied on the incomplete facts presented because the record fails to establish how long claimant was prejudiced by this incomplete and/or inaccurate information. At some point claimant had to realize that benefits would not be forthcoming voluntarily from either respondent or Mitchell Construction. Even if estoppel is applied to toll the statute while claimant was justifiably relying on respondent's misrepresentations, it is still not clear that this went on long enough to bring claimant's written claim within the one year period mandated by statute. Accordingly, benefits must be denied at this time.

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.[18]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bryce D. Benedict on October 18, 2001, should be, in the same is hereby, affirmed and benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of February 2002.

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

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[17] *See e.g.,* K.S.A. 44-557; K.A.R. 51-12-2.

[18] *See* K.S.A. 44-534(a)(2).